

BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA
DOCKET NO. 2017-305-E

IN RE:

Request of the South Carolina Office of
 Regulatory Staff for Rate Relief to
 SCE&G Rates Pursuant to
 S.C. Code Ann. § 58-27-920

) **BRIEF IN SUPPORT OF**
) **MOTION TO AMEND REQUEST OF**
) **THE SOUTH CAROLINA OFFICE OF**
) **REGULATORY STAFF FOR RATE**
) **RELIEF TO SCE&G RATES**
) **PURSUANT TO**
) **S.C. CODE ANN. § 58-27-920**

Procedural History

1. Pursuant to Public Service Commission of South Carolina (“the Commission”) Order No. 2017-68-H, the South Carolina Office of Regulatory Staff (“ORS”) submits this Brief (“Brief”) in further support of ORS’s Motion to Amend (“Motion to Amend”).

2. This docketed matter, Docket No. 2017-305-E, was opened on September 26, 2017, when ORS filed a Request for Rate Relief to South Carolina Electric & Gas (“SCE&G”) Rates Pursuant to S.C. Code Ann. § 58-27-920 (“Request”).

3. On October 17, 2017, ORS Filed a Motion to Amend the Request by adding to it the request that the Commission consider the most prudent manner by which SCE&G will enable its customers to realize the value of certain payments received by SCE&G, which are discussed further below.

4. On October 27, 2017, SCE&G filed a Response in Opposition to and Motion to Strike ORS’s Motion to Amend.

5. On November 6, 2017, the Commission issued Order No. 2017-68-H setting forth a briefing schedule on ORS's Motion to Amend, and this Brief is filed pursuant to that schedule.

Background

6. SCE&G is 55% owner of the V.C. Summer Nuclear Units 2 and 3 ("the Units") and Santee Cooper, an entity not regulated by the Commission, owns the remaining 45%.

7. Westinghouse Electric Corporation, LLC ("WEC") was the primary contractor for the Units prior to its March 29, 2017 bankruptcy declaration.

8. On July 27, 2017, Toshiba Corporation ("Toshiba") entered into an agreement with SCE&G and Santee Cooper, which set the limit of Toshiba's guarantee obligation, as the former parent company of WEC, at approximately \$2.168 billion ("Guarantee Payment") to be paid out over five years in full satisfaction of Toshiba's obligations of WEC under the engineering, procurement, and construction contract for the Units.¹ As a 55% owner of the Units, SCE&G was entitled to approximately \$1.192 billion of the Guarantee Payment.

9. On July 31, 2017, SCE&G announced its intent to seek approval of an abandonment plan for the Units.

10. On September 26, 2017, the South Carolina Office of the Attorney General issued an opinion stating that portions of the South Carolina Base Load Review Act ("BLRA") are constitutionally suspect. The BLRA allowed SCE&G to adjust rates annually through a process called "revised rates" to cover financing of the Units' construction.

11. After reviewing the Attorney General's opinion and also on September 26, 2017, ORS filed, pursuant to S.C. Code Ann. § 58-27-920, a Request with the Commission asking that the Commission Order: (1) SCE&G to immediately suspend all revised rates collections, and (2)

¹ The Toshiba Press Release issued July 28, 2017 is attached to ORS's Motion to Amend as Exhibit 1.

further action including credits to future bills or refunds if the General Assembly amends or revokes the BLRA or a court of competent jurisdiction declares the BLRA unconstitutional.²

12. On September 27, 2017, the day after ORS filed its Request, SCANA Corporation (“SCANA”), SCE&G’s parent corporation, issued a press release (“Press Release”) indicating that SCE&G had sold to Citibank, N.A. (“Citibank”) for approximately \$1.016 billion all future Guarantee Payments that Toshiba owed to SCE&G after Toshiba’s October 2017 payment.³

13. On October 2, 2017, Toshiba made a payment of \$150 million towards satisfaction of Toshiba’s Guarantee Payment with \$82.5 million going towards SCE&G’s 55% share.

14. On October 17, 2017, ORS filed a Motion to Amend its Request requesting that the Commission consider the appropriate application of the Citibank and Toshiba payments to benefit SCE&G customers and any other action or relief the Commission may deem necessary or appropriate.

15. On October 27, 2017, SCE&G filed a Response in Opposition to and Motion to Strike ORS’s Motion to Amend resulting in the Commission issuing a schedule in Order No. 2017-68-H for briefs to be filed on the matter. This brief is filed pursuant to that schedule.

SUPPORT FOR THE MOTION TO AMEND AND IN OPPOSITION TO SCE&G’S

MOTION TO STRIKE

16. The Motion to Amend asks the Commission to consider in this docket the most prudent manner by which SCE&G will enable its customers to realize the value of the Toshiba

² On September 28, 2017, SCE&G filed a Motion to Dismiss ORS’s Request. Briefs in opposition to SCE&G’s Motion to Dismiss ORS’s Request are due on or before November 21, 2017 pursuant to Commission Order No. 2017-58-H.

³ The Press Release is attached to the Motion to Amend as Exhibit 2.

and Citibank payments. ORS incorporates the support already set forth in its Motion to Amend and adds to it the further support below.

17. ORS's Request filed pursuant to S.C. Code Ann. § 58-27-920 allows the Commission to put into effect a schedule of rates as shall be deemed "fair and reasonable" after a preliminary investigation by ORS and upon such evidence as the Commission seems sufficient.

18. On September 26, 2017, when ORS filed its Request, ORS did not know about the monetization of the Toshiba Guarantee Payment to include it in its Request, and upon investigating the matter, ORS sought to amend its Request so that the Toshiba and Citibank payments may be included in the Commission's consideration of rates in this docket.

19. This consideration by the Commission should be allowed in determining a "fair and reasonable" rate to be established pursuant to S.C. Code Ann. § 58-27-920, and the Motion to Amend is within the parameters of the Commission regulation allowing amendments, S.C. Code Ann. Regs. 103-828.

20. In further support, SCE&G's Form 10-Q filed on November 3, 2017 with the Securities and Exchange Commission for the quarterly period ended September 30, 2017 affirms the relief sought in the Motion to Amend. Pages 38 and 59 state "the net value of the proceeds [from the monetization of the Toshiba Settlement] will be utilized to benefit SCE&G's customers in a manner to be determined by the SCPSC [Public Service Commission of South Carolina]."⁴ ORS is asking that the Commission determine in this docket the manner the payments will be utilized.

21. Of concern in Consolidated Note 4 on page 25 of SCE&G's Form 10-Q for the quarterly period ended September 30, 2017 is this sentence: "Portions of the proceeds received under or arising from the monetization of the Toshiba Settlement in late September and early

⁴ <https://www.sec.gov/Archives/edgar/data/91882/000075473717000084/a2017930-10q.htm>

October 2017 have been utilized to repay maturing commercial paper balances, which short-term borrowings had been incurred for the construction of the New Units prior to the decision to stop their construction....” This sentence contradicts the statement that the proceeds will be utilized to benefit SCE&G’s customers in a manner to be determined by the Commission.

22. Lastly, in analyzing ORS’s Motion to Amend and SCE&G’s Motion to Strike, it is helpful to look at the comparable civil court rules, Rules 12(f) and 15(a), SCRCP.

23. Rule 12(f), SCRCP states, in part, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter. The amendment sought by ORS does not meet any of these characteristics and should not be stricken.

24. Rule 15(a), SCRCP permits amendments of pleadings and the recent Supreme Court case, Patton v. Miller, 2017 S.C. Lexis 114, at *22-23; 804 S.E.2d 252 (2017) offers guidance:

Rule 15(a) provides that when a party asks to amend his pleading, "leave shall be freely given when justice so requires and does not prejudice any other party." Rule 15(a), SCRCP. "This rule strongly favors amendments and the court is encouraged to freely grant leave to amend." Parker v. Spartanburg Sanitary Sewer Dist., 362 S.C. 276, 286, 607 S.E.2d 711, 717 (Ct. App. 2005) (citing Jarrell v. Seaboard Sys. R.R., Inc., 294 S.C. 183, 186, 363 S.E.2d 398, 399 (Ct. App. 1987)). "Rule 15(a) is substantially the same as the Federal Rule," Rule 15(a), SCRCP notes, and the Supreme Court of the United States has referred to the Rule's "freely given" provision as a "mandate" that "is to be heeded," Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L. Ed. 2d 222, 226 (1962). The Foman Court continued:

If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment,

etc.—the leave sought should, as the rules require, be "freely given."

Id. (citing Fed. R. Civ. P. 15(a)); accord Forrester v. Smith & Steele Builders, Inc., 295 S.C. 504, 507, 369 S.E.2d 156, 158 (Ct. App. 1988).

In this case, the circuit court never considered Rule 15(a). While we have consistently held that a circuit court's ruling on a Rule 15 motion to amend is within its discretion,⁵ a court's failure to exercise its discretion is itself an abuse of discretion. State v. Hawes, 411 S.C. 188, 191, 767 S.E.2d 707, 708 (2015) (quoting Samples v. Mitchell, 329 S.C. 105, 114, 495 S.E.2d 213, 218 (Ct. App. 1997)).

25. The Motion to Amend is not prejudicial to SCE&G, is not based on bad faith, and will not cause undue delay. To the contrary, the Motion to Amend will promote judicial economy in determining how to apply the Citibank and Toshiba payments to the best benefit of ratepayers.

Conclusion

26. ORS respectfully submits that the Commission grant the Motion to Amend and consider in this docket the most prudent manner by which SCE&G will enable its customers to realize the value of the Toshiba and Citibank payments.

⁵ See, e.g., Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry, 403 S.C. 623, 632, 743 S.E.2d 808, 812 (2013) ("A motion to amend is within the sound discretion of the trial judge" (citing Foggie v. CSX Transp., Inc., 315 S.C. 17, 22, 431 S.E.2d 587, 590 (1993))).

Respectfully submitted,

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OF REGULATORY STAFF

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